

2015

**The State of Utah, Plaintiff/ Appellee, vs. Jason Michael Speed,  
Defendant/ Appellant.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,

Plaintiff/Appellee,

vs.

JASON MICHAEL SPEED,

Defendant/Appellant.

**BRIEF OF APPELLANT**

Appellate Case No.: 20150011-CA

Trial Court Case No.: 101901272 FS

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An appeal from a final Sentence, Judgment, and Conviction for Attempted Theft by Deception, a Third-Degree Felony, in violation of Utah Code Ann. § 76-6-405, in the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable Judith Atherton presiding. The defendant is not incarcerated.

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## **STATEMENT OF JURISDICTION**

The Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78A-4-103(2)(e), whereby the defendant in a district court criminal action may take an appeal to the Court of Appeals from a final order for anything other than a first degree or capital felony. Appellant was convicted of Attempted Theft by Deception, a Third Degree Felony, in violation of Utah Code Ann. § 76-6-405. Appellant filed a Motion for Relief from Judgment and Request for Restitution Hearing on April 23, 2014. That motion was denied on January 2, 2015.

## **STATEMENT OF ISSUES**

### **Issue No. 1**

Issue: Whether the trial court abused its discretion in denying the Defendant's Motion for Relief from Judgment and Request for Restitution Hearing.

Determinative law: Utah Code Ann. § 77-38a-302; *State v. Brown*, 2009 UT App 285, 221 P.3d 273; *State v. Bickley*, 2002 UT App 342, 60 P.3d 582.

Standard of review: An appellate court will not disturb a trial court's order of restitution unless the trial court exceeds the authority prescribed by law or abuses its discretion. Furthermore, whether a restitution award is proper depends solely upon interpretation of the governing statute, and the trial court's interpretation of a statute presents a question of law, which an appellate court reviews for correctness. *See State v. Harvell*, 2009 UT App 271, ¶ 7, 220 P.3d 174.

## Issue No. 2

Issue: Whether Defendant's trial counsel provided ineffective assistance of counsel to Defendant by failing to submit a written request for a restitution hearing at the trial court's direction.

Determinative law: The United States Supreme Court set forth the proper test for determining whether counsel's performance was ineffective in *Strickland v. Washington*, 466 U.S. 668 (1984):

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of due process. Unless a defendant makes both showings, it cannot be said that the conviction or judgment resulted from a breakdown in the adversary process that renders the result unreliable.

Standard of review: Ineffective assistance of counsel claims raised for the first time on appeal are questions of law reviewed for correctness. *See State v. Vos*, 2007 UT App 215, ¶ 9, 164 P.3d 1258.

### **DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS**

U.S. Const. amend. VI: Addendum A

Utah Const. art. I, § 12: Addendum B

Utah Code § 77-38a-302

## STATEMENT OF THE CASE

On February 19, 2010, Mr. Speed was charged by Information with one count of Theft by Deception, a third-degree felony, in violation of Utah Code § 76-6-405. (R7-9.) Three co-defendants were charged in the same case. (R3-10.) A preliminary hearing was scheduled for May 4, 2010, and Mr. Speed waived his right to a preliminary hearing. (R22.) Mr. Speed was bound over for trial. (*Id.*) Mr. Speed was arraigned on July 9, 2010. (R23.)

On August 13, 2010, Mr. Speed pleaded guilty to an amended Information of Attempted Theft by Deception, a Third-Degree Felony, in violation of Utah Code Ann. § 76-6-405. (R24-32.) The following factual basis was given for the charge:

**Mr. Van de Camp:** Judge, on or about June 1st of 2009 – this went on for a while. My client exercised unauthorized control of the property of another by deception that he intended to deprive [sic] the owner of the value, which exceeded \$5,000.

What he essentially did, was he was a manager of a cell phone store and he was sending phones to himself and then selling or giving those phones away. That value exceeded \$5,000. In fact it was quite significant. And we don't have any formal agreements with regard to the total amount, but we will probably come back before this court to determine what that total restitution will be as well as what the court-ordered restitution will be because of its significant number.

(R121 at 5:2-14.) The Court ordered Mr. Speed to report to Adult Probation & Parole for a pre-sentence report. (R34.)

On October 15, 2010, Mr. Speed was sentenced to an indeterminate term not to exceed five years in the Utah State Prison. (R46-47.) The prison term was suspended. (*Id.*) Mr. Speed was also sentenced to six days jail, with credit for the six days previously

served. (*Id.*) He was fined \$750 and required to complete 150 hours of community service. (*Id.*) Mr. Speed was placed on 36 months of probation. (*Id.*) One of the conditions of probation listed in the Sentence, Judgment, and Commitment was to “pay restitution.” (*Id.*)

At the hearing, the judge asked Mr. Speed to pay restitution in the amount of \$126,547. (R122 at 9:17-18.) Judge Atherton stated that she would allow defense counsel to respond, but that she wanted to “get this on” rather than deferring it. (*Id.* at 9:17-23.) Judge Atherton wanted Mr. Speed to make monthly payments every single month so that ACS would “immediately start getting reimbursed for their losses. (*Id.* at 9:23-10:2.) The following exchange occurred:

**Mr. Van de Camp:** And Your Honor, speaking with Mr. Renteria a little while ago, we talked about having a restitution hearing to determine what court-ordered restitution and total restitution would be.

**The Court:** Well, get closer. If there are disputes I – I set a lot of these restitution hearings because it’s murky. So what I want you to do is file a motion for restitution.

**Mr. Van de Camp:** Okay.

**The Court:** And with some specifics about what I can look at before we get to the restitution hearing –

**Mr. Van de Camp:** Right.

**The Court:** -- and nobody knows anything.

**Mr. Van de Camp:** Yeah. I think – it’s not a complicated – I don’t think it’s going to be a complicated hearing. The only issue is really addressing his availability to pay and those resources he has available to pay this whole amount.

**The Court:** Well, let's get all of that documentation then.

**Mr. Van de Camp:** Okay.

**The Court:** I will set it for hearing.

**Mr. Van de Camp:** Okay. And, Your Honor, how long do we have to file that motion, just so –

**The Court:** Whenever you want.

**Mr. Van de Camp:** Okay. Thank you. (End of hearing.)

(R122 at 10:10-11:10.) The record contains two signed orders of the minutes from the Sentence, Judgment, and Commitment hearing: the first specifies the amount of restitution, but the second only orders the defendant to “pay restitution.” *Compare* R43-45 *with* R46-47.

On February 22, 2011, AP&P filed a Progress Report with the Court. (R48-49.) AP&P notes that Mr. Speed had been sentenced on October 15, 2010, and one of the terms of his probation was to “[p]ay restitution in the amount of \$TBD.” (*Id.*) AP&P requested the court order the fine dismissed because Mr. Speed completed his community service, and order probation closed as successful, or transferred to Court Probation if the court deemed further supervision necessary. (*Id.*) On February 17, 2011, the court ordered the fine dismissed but noted that it was too early to terminate probation because only four of the 36 months had been completed. (*Id.*)

On July 26, 2011, AP&P filed another Progress Report with the court and again requested that probation be closed as successful. (R50-52.) AP&P noted that one of the conditions of probation was for Mr. Speed to “[p]ay restitution in reference to case

#101901272.” (*Id.*) The court denied AP&P’s request, but later signed a new Sentence, Judgment, and Commitment order specifying an amount of restitution on February 27, 2012. (R53-55.)<sup>1</sup>

On September 24, 2013, AP&P filed another Progress Report. (R57-58.) AP&P again noted that a term of probation was to “[p]ay restitution in the amount of \$TBD.” (*Id.*) For the first time, an amount of restitution appeared in the financial summary, and AP&P stated that Mr. Speed “has a very large restitution amount, and he understands he will be paying on it for several years, if not forever.” (*Id.*)

On October 1, 2013, Judge Vernice Trease issued a minute entry giving the prosecution and defense counsel 14 days to submit any objections or other input regarding AP&P’s recommendation. (R56.) The minute order only stated that “any remaining financial obligations be referred to Office of State Debt Collection,” without specifically mentioning restitution. (*Id.*) The minute order was served on the State and Mr. Speed’s trial counsel, Mr. Van de Kamp. (*Id.*) Upon receiving no opposition from the prosecutor, the court granted the request to terminate probation and send the remaining restitution to OSDC. (R59.)

On October 30, 2013, the Court received a letter from the defendant requesting a restitution hearing. (R60.) Mr. Speed stated that he was eighteen months into his probation before he received any notice of the restitution amount that he would be paying,

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<sup>1</sup> The Sentence, Judgment, Commitment is dated October 15, 2010, but the record reflects that it was entered February 27, 2012.

and by then there was already \$7,000 in accumulated interest. (*Id.*) He stated that his legal defender did not discuss the restitution process with him, and he wanted a chance to dispute that amount. (*Id.*)

On September 11, 2014, counsel for Mr. Speed filed a Motion for Relief from Judgment and Request for Restitution Hearing. (R85-90.) A hearing was held on December 5, 2014. Judge Trease found that even though the restitution amount was not contained on the original judgment, sentence, and commitment, Judge Atherton stated the amount in the transcript and so that omission must have been a “clerical error.” (R123 at 9:17-21.) Judge Trease also found that because Mr. Speed did not object to the restitution being sent to debt collection pursuant to the October 1, 2013 minute order, Mr. Speed waived any objection to the restitution. (*Id.* at 10:17-23.) Finally, Judge Trease found that the onus was on defense counsel to file a motion for a restitution hearing, rather than on the State. (*Id.* at 11:16-21.)

A Notice of Appeal was filed on December 24, 2014. (R101.) After the minutes from the restitution hearing were officially entered on January 2, 2015, an Amended Notice of Appeal was filed on January 4, 2015. (R107.) Mr. Speed is not incarcerated.

### **STATEMENT OF FACTS**

On November 5, 2009, the director of security for ACS Incorporated (“ACS”) contacted the Salt Lake City Police Department to report that some employees of the company had been involved in fraudulent activity. (R37.) ACS was an information technology outsource company that worked in conjunction with Verizon Wireless. (*Id.*)

ACS handled the customer calls for Verizon Wireless, and had supervisors that oversaw the call takers. (*Id.*) The supervisors were authorized to discount telephones to customers, which might occur if a customer complained or wanted to cancel their service. (*Id.*)

ACS discovered that a number of supervisors, including Mr. Speed, were taking advantage of their ability to give discounts. (*Id.*) The supervisors would discount the phones to nothing, and then sell those phones. (*Id.*) ACS told Salt Lake City detectives that Mr. Speed sent out a total of \$123,153 in free phones, but Mr. Speed claimed that some of the phones sent out were to actual customers. (R38.) A detective went through ACS statements for a few months and concluded that the value of the phones illegally sent out by the defendant during those few months was \$63,758.82. (*Id.*) ACS requested restitution in the amount of \$126,547. (R40.) However, there is no evidence supporting that amount on the record.

### **SUMMARY OF THE ARGUMENT**

The trial court abused its discretion in denying Mr. Speed's Motion for Relief from Judgment and Request for a Restitution Hearing because it failed to comply with several statutory requirements for the imposition of restitution. First, the trial court abused its discretion by failing to afford Mr. Speed a full restitution hearing when he objected to the amount of restitution alleged by the victim. The trial court also failed to determine court-ordered restitution, including considering all the relevant factors, within a year after sentencing. Finally, the trial court impermissibly shifted the burden of proof on restitution from the prosecutor to the defense.

In the alternative, if this Court finds that Mr. Speed waived his objections to restitution through his counsel's actions, the Court should find that Mr. Speed's trial counsel rendered ineffective assistance of counsel. Mr. Speed's trial counsel failed to file a motion for restitution at the trial court's direction, even though he knew his client disputed the amount of restitution and wanted a hearing on the matter. This deficient performance greatly prejudiced Mr. Speed, as it deprived him of his due process rights to a restitution hearing and has saddled him with an enormously burdensome debt.

Therefore, Mr. Speed respectfully requests this Court vacate the restitution order, or in the alternative, remand the proceedings so that a restitution hearing may be held with the trial court.

### **ARGUMENT**

#### **I. The trial court abused its discretion in denying Mr. Speed's Motion for Relief from Judgment and Request for a Restitution Hearing.**

The trial court abused its discretion in denying Mr. Speed's Motion for Relief from Judgment and Request for a Restitution Hearing because Mr. Speed was denied his right to a full restitution hearing, court-ordered restitution was not determined within a year of sentencing, and the State failed to meet its burden of proof on restitution.

A trial court abuses its discretion if its decision is beyond the limits of reasonableness. *See State v. Clopten*, 2009 UT 84, ¶ 6, 223 P.3d 1103; *State v. Alfatlawi*, 2006 UT App 511, ¶ 20, 153 P.3d 804. If the actions of the trial court are inherently unfair, it has also abused its discretion. *See State v. Valdez*, 2008 UT App 329, ¶ 4, 194 P.3d 195 (mem.), *cert. denied*, 200 P.3d 193 (Utah 2010).

Utah's restitution statutory scheme identifies several strict prerequisites for the imposition of any restitution on a criminal defendant, which were not complied with in this case. This statutory scheme identifies two separate types of restitution: complete restitution and court-ordered restitution. *See* Utah Code Ann. § 77-38a-302(2) (2013). The court is required by law to determine "complete restitution," which is "restitution necessary to compensate a victim for all losses caused by the defendant." *Id.* (emphasis added). In contrast, the court has discretion to impose "court-ordered restitution" and actually order the defendant to pay an amount in restitution. *Id.* The court retains total discretion to decide whether the defendant should pay any restitution, or to order the defendant to pay an amount less than determined to be complete restitution. *Id.*

In determining whether restitution is appropriate, "the court *shall* follow the criteria and procedures as provided in Subsections (2) through (5)." *Id.* § 77-38a-302(1) (emphasis added). If the court determines that restitution is appropriate, it "shall" make the reasons for the decision part of the court record. *Id.* § 77-38a-302(3). Should the Court order complete restitution, it must consider all relevant facts and make all necessary findings on the record. *Id.* § 77-38a-302(5)(b).

In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider each of the following factors:

- (i) the factors listed in Subsections 5(a) and (b) (for determining complete restitution;
- (ii) the financial resources of the defendant, as disclosed in the financial declaration described in Section 77-38a-204;
- (iii) the burden that payment of restitution will impose, with regard to the other obligations of the defendant;

- (iv) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;
- (v) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and
- (vi) other circumstances that the court determines may make restitution inappropriate.

*See id.* § 77-38a-302(5)(c). “If the defendant objects to the imposition, amount, or distribution of the restitution, the court *shall* allow the defendant a full hearing on the issue.” *Id.* § 77-38a-302(4) (emphasis added).

**A. The trial court abused its discretion when it denied Mr. Speed’s Motion for Relief from Judgment and Request for Restitution Hearing because Mr. Speed was denied a full restitution hearing after he objected to the amount of restitution at sentencing.**

The trial court abused its discretion when it denied Mr. Speed’s Motion for Relief from Judgment and Request for Restitution Hearing because Mr. Speed was never afforded a full and complete restitution hearing despite his objection to the amount of restitution.

Utah law is clear that when a defendant has *any* objection to “the imposition, amount, or distribution of the restitution, the court shall allow the defendant a full hearing on the issue.” Utah Code Ann. § 77-38a-302(4). “A defendant has all the due process rights inherent in such a hearing and also has the right to appeal the resulting determination.” *State v. Gibson*, 2009 UT App 108, ¶ 15, 208 P.3d 543. Utah’s Restitution Act does not contain any requirement that the defendant file a motion for a restitution hearing; rather, if it is clear that the defendant disputes some aspect of a restitution order, the trial court is obligated to afford the defendant a full hearing.

In *State v. Haga*, the Utah Court of Appeals remanded the case to the trial court to hold a restitution hearing because the defendant requested a restitution hearing at his sentence, but never received one. 954 P.2d 1284, 1289 (Utah Ct. App. 1998). Under both the United States and the Utah State Constitutions, due process requires criminal proceedings including sentencing to be based upon accurate and reasonably reliable information. *See State v. Gomez*, 887 P.2d 853, 854 (Utah 1994). Thus, “fundamental principles of procedural fairness in sentencing require that a defendant have the right to examine and challenge the accuracy and reliability of the factual information upon which his sentence is based.” *Id.* at 855. However, procedural fairness in sentencing is satisfied when the “defendant had a full opportunity... to examine and challenge all factual information upon which the court based his sentence.” *Id.*; *see also State v. Weeks*, 2000 UT App 273, ¶ 8, 12 P.3d 110.

In *State v. Gibson*, the Utah Court of Appeals found the record clearly reflected that the parties were in a dispute about the exact amount of restitution owed. 2009 UT App 108, ¶ 14. Due to this disagreement, the *Gibson* court found that the district court appropriately scheduled a restitution hearing. *See id.* (citing Utah Code Ann. § 77-38a-203(2)(c)). There is no indication that, after the parties indicated their dispute over the amount of restitution, the trial court in *Gibson* required a motion to be filed in order to schedule a hearing. *See id.*

Like the defendant in *Gibson*, Mr. Speed clearly indicated his objection to the amount of restitution recommended in the pre-sentence report. At sentencing, Judge

Atherton asked Mr. Speed to pay restitution in the amount of \$126,547. (R122 at 9:17-18.) Judge Atherton stated that she would allow defense counsel to respond, but that she wanted to “get this on” rather than deferring it. (*Id.* at 9:17-23.) Judge Atherton wanted Mr. Speed to make monthly payments every single month so that ACS would “immediately start getting reimbursed for their losses.” (*Id.* at 9:23-10:2.) Mr. Speed’s trial counsel, Brock Van de Kamp, immediately notified Judge Atherton that he had spoken to the prosecutor and they wanted to have a restitution hearing to determine what complete and court-ordered restitution would be. (R122 at 10:10-11:10.) Judge Atherton acknowledged that she sets a lot of restitution hearings when there are disputes, and asked trial counsel to file a “motion for restitution” so she can look at specifics before the restitution hearing. (*Id.*) Mr. Speed’s trial counsel represented that it would likely not be a complicated hearing, but that they would be addressing Mr. Speed’s availability to pay the whole amount. (*Id.*) Judge Atherton then stated, “I will set it for hearing.” (*Id.*) Judge Atherton told trial counsel that he could file that documentation “[w]henever [he] want[s].” (*Id.*)

This exchange between Judge Atherton and defense counsel was sufficient to put Judge Atherton on notice of Mr. Speed’s objection to the amount of restitution. Utah Code Ann. § 77-38a-302(4) only requires the defendant to make some objection to the “imposition, amount, or distribution of the restitution” before the trial court is obligated to allow the defendant a full hearing on restitution. Once Judge Atherton was aware that the defense and the prosecutor had a dispute over restitution, she should have scheduled the

restitution hearing.

Similar to *Gibson*, the dispute over the amount of restitution was identified at the sentencing hearing on the record, rather in a written motion. 2009 UT App 108, ¶ 14. Like the trial court in *Gibson*, Judge Atherton should have scheduled the restitution hearing upon learning that there was a dispute. *See id.* It was an abuse of discretion for Judge Atherton to require defense counsel to file a motion for restitution prior to scheduling the hearing, as that adds an additional requirement not contemplated by the statute and is therefore inherently unfair to Mr. Speed. *See State v. Valdez*, 2008 UT App 329, ¶ 4.

Further, Mr. Speed did not waive his right to a restitution hearing when his trial counsel did not file a “motion for restitution.” As noted above, Mr. Speed’s ... Also, it is unclear from Judge Atherton’s response to trial counsel’s proffers whether the filing of the motion for restitution was required before Judge Atherton would set the hearing. (*See* R122 at 10:10-11:10 (“I will set it for hearing.”).) Judge Atherton also told Mr. Speed’s counsel that he could file the documentation that would be presented at the hearing “[w]henever [he] want[s].” (*Id.*) It would be inherently unfair and contrary to Utah law to find that Mr. Speed waived his right to a restitution hearing by his counsel’s failure to file a motion not contemplated by the statute, particularly when trial counsel was given an open-ended deadline to do so. Therefore, the Court of Appeals should find that Judge Atherton’s failure to schedule a hearing was an abuse of discretion and was based on a misinterpretation of Utah’s Restitution Act, and therefore Judge Trease’s denial of Mr. Speed’s Motion for Relief from Judgment and Request for Restitution Hearing was

erroneous.

**B. Because the trial court did not order a certain amount of restitution within one year of sentencing, it lacked jurisdiction to do so when it amended the Sentence, Judgment, and Commitment on February 27, 2012 to include a restitution amount.**

In the alternative, if the Court finds that Judge Atherton ordered restitution at sentencing and Mr. Speed either failed to properly object or waived an objection, the Court should vacate the order of restitution because it was not entered within one year of sentencing. “Jurisdiction to order restitution in a criminal case is statutory.” *State v. Poole*, 2015 UT App 220, ¶ 5. Utah law requires that a trial court “shall make *all* restitution orders at the time of sentencing if feasible, otherwise within one year after sentencing.” Utah Code Ann. § 77-38a-302(5)(d)(i) (emphasis added). Therefore, Utah’s Restitution Act requires that the district court “determine... court-ordered restitution” and “make all restitution orders” no later than one year from sentencing. *Id.*; *see also id.* § 77-38a-302(2)(b).

The Utah Court of Appeals recently clarified that this one-year requirement for making a restitution order is not satisfied by an order that does not include an amount and is therefore incomplete. *Poole*, 2015 UT App 220, ¶ 11. In *Poole*, the defendant had agreed to pay restitution as part of a plea deal, and the trial court converted the defendant’s fines to community service because it recognized that the defendant was going to have “a bunch of restitution... to pay off.” *See id.* ¶ 2. However, because the State only had a preliminary estimate of damages at the time of sentencing, the trial court agreed to hold restitution open for up to one year, and directed the State to submit its

restitution request within ninety days of sentencing. *See id.* The State failed to do so.

Eleven months after sentencing, the State moved for an order of restitution. *See id.*

¶ 4. Over the defendant's objection, the trial court granted the motion, and entered a restitution order fifteen months after sentencing. *See id.* On appeal, the Utah Court of Appeals vacated the restitution order. *See id.* ¶ 22. The court found that Utah Code Ann. § 77-38a-302(2)(b) plainly requires that an order of restitution with a sum certain be issued within a year. *See id.* ¶ 11. The mere filing of a motion for restitution or a court's statement of intent to set restitution at some future date did not toll that one-year time period. *See id.* Therefore, the court's statements at sentencing that it planned to order restitution upon receiving evidence of the amount owed—even if those statements established a condition of probation—did not meet the statutory requirement for a final restitution order. *See id.* Because the restitution order, including the amount, was not issued until fifteen months after sentencing, the order was vacated for lack of strict compliance with the one-year limitation. *See id.* ¶¶ 20-21.

**a. The last signed Sentence, Judgment, and Commitment did not specify an amount of restitution.**

Similar to the judge in *Poole*, Judge Atherton ordered that Mr. Speed was required to pay restitution as part of his sentence, but did not specify an amount in the signed order. One of the conditions of probation listed in the Sentence, Judgment, and Commitment was to “pay restitution,” but the order did not specify an amount. (R46-47.) This is reflected in the Progress Reports filed by AP&P. The reports from February 22, 2011, and September 24, 2013, state that one of the terms of probation was to “[p]ay

restitution in the amount of \$TBD.” (R48-49, 57-58.) The report from July 26, 2011, only indicates that Mr. Speed was required to pay restitution in reference to case #101901272. (R50-52.) Although Judge Atherton discussed the amount of complete restitution at the sentencing hearing, no final amount was included in the order—likely because the trial court had not yet determined the amount of court-ordered restitution, as explained below.

In ruling on Mr. Speed’s Motion for Relief from Judgment and Request for Restitution Hearing, Judge Trease determined that the failure to include an amount was a “clerical error.” Such a finding was an abuse of discretion, because defendants should be able to rely on a trial court’s signed order to include all the terms of a sentence. Further, AP&P’s reliance on the fact that the amount of restitution was to be determined, and the court’s failure to correct that term of probation, indicates more than a “clerical error.”

Because all restitution orders, including an amount of court-ordered restitution, were not entered into the record until sixteen months after sentencing on February 27, 2012, the trial court lacked jurisdiction to enter in those orders.

**b. Judge Atherton never determined “court-ordered restitution.”**

Judge Atherton never determined “court-ordered restitution,” and because more than a year has passed since sentencing, the trial court lacks jurisdiction to do so. In determining the monetary sum and other conditions for court-ordered restitution, the court is required to consider the factors outlined in Utah Code Ann. § 77-38a-302(5)(c). These factors include the financial resources of the defendant, as disclosed in a financial declaration, and the ability of the defendant to pay restitution. *See id.*

The Utah Supreme Court has found that a sentencing court is not required to reference each of the required factors on the record; but, the sentencing court must set forth the reasons for its restitution decision in the record. *See State v. Weeks*, 2002 UT 98, ¶ 25 n.11, 61 P.3d 1000. “There is no mandatory requirement in the language of the statute that a sentencing court make a record setting forth its reasoning as to each of the factors in its restitution order, only that it consider each factor and make a record setting forth the reasons for its decision.” *State v. Smith*, 2003 UT App 179, ¶ 29, 72 P.3d 692.

In *Smith*, the court found that in the absence of any additional record findings, it was forced to limit its review to the language of the restitution order. *See id.* ¶ 30. Based upon the language of this order, the appellate court easily understood the defendant’s confusion concerning the restitution amount, as nowhere in the order did the court explain its rationale for the amount ordered or the reasoning underlying its decision. *See id.* Although it is permissible to assume that the trial court considered all of the required factors, this recourse is only available if it is reasonable to do so. *See id.* ¶ 30 n. 9. In *Smith*, the appellate court concluded that it would not be reasonable to assume that all of the restitution factors were considered absent some evidence to the contrary. *See id.*

In this case, Judge Atherton recognized that Mr. Speed was going to have a large amount of restitution to pay off. (R122 at 9:17-18.) Judge Atherton wanted Mr. Speed to begin reimbursing ACS for its losses while a restitution hearing was pending. (*Id.*) Judge Atherton was also aware that the restitution hearing would focus on the amount of court-ordered restitution. (*Id.*) Upon hearing that there was a dispute as to the ultimate amount

that Mr. Speed would be ordered to pay in restitution, Judge Atherton advised the parties to “get closer” on a number. (*Id.*) These exchanges indicate that Judge Atherton determined complete restitution, as she is required to by statute, by accepting what ACS alleged it lost in the pre-sentence report. (*See id.*) Because defense counsel tacitly acknowledged that Mr. Speed would be paying some amount of restitution, and only disputed the total amount, Judge Atherton presumably wanted Mr. Speed to get started on those payments. (*See id.*) However, court-ordered restitution was never determined. (*See id.*) In fact, Judge Atherton requested more documentation regarding the factors for court-ordered restitution prior to the hearing. (*See id.*)

It is not reasonable to presume that Judge Atherton considered all the required factors before imposing court-ordered restitution on Ms. Speed; indeed, to presume that would be contrary to the plain meaning of the exchange between Judge Atherton and Mr. Speed. Therefore, the Court of Appeals should find that the trial court never determined court-ordered restitution, and the restitution order should therefore be vacated.

**C. The restitution award should be vacated because the State failed to prove the amount of restitution was caused by Mr. Speed’s criminal activities.**

The restitution award should be vacated because the State did not prove that the amount alleged to be lost by ACS was caused by Mr. Speed’s criminal activities. By requiring that the defense counsel file a motion for restitution, the trial court impermissibly shifted the burden of proof to Mr. Speed.

Restitution is only available for a victim “whom the court determines has suffered pecuniary damages *as a result of* the defendant’s criminal activities.” *Id.* § 77-38a-

102(14)(a) (emphasis added). “[T]o include an amount in a restitution order, the State must prove that the victim has suffered economic injury and that the injury arose out of the defendant’s criminal activities.” *State v. Brown*, 2009 UT App 285, ¶ 10, 221 P.3d 273. An order of restitution is prohibited “for criminal activities for which the defendant did not admit responsibility, was not convicted, or did not agree to pay restitution.” Utah Code Ann. § 77–38a–302(5)(a); *State v. Bickley*, 2002 UT App 342, ¶ 9, 60 P.3d 582.

Therefore, restitution may be awarded “only in cases where liability is clear as a matter of law and where the commission of the crime clearly establishes causality of the injury or damages.” *State v. Poulsen*, 2012 UT App 292, ¶ 11, 288 P.3d 601 (citing *State v. Robinson*, 860 P.2d 979, 983 (Utah Ct.App.1993)). “Utah has adopted a modified ‘but for’ test to determine whether pecuniary damages actually arise out of criminal activities.” *Id.* This test requires a showing that “(1) the damages would not have occurred but for the conduct underlying the ... [defendant’s] conviction and (2) the causal nexus between the [criminal] conduct and the loss ... is not too attenuated (either factually or temporally).” *Id.* (alterations and omissions in original) (citations and internal quotation marks omitted).

In *Poulsen*, the defendant was convicted of participating in a pyramid scheme, a Class B misdemeanor. *See id.* ¶13. The defendant only admitted to “receiving compensation for the introduction of other persons in to the pyramid scheme.” *See id.* At the restitution hearing, no witnesses were called, and the State relied solely on evidence presented in connection with the criminal conviction. *See id.* The statute under which the defendant was convicted, paired with the allegations to which he admitted to, were

insufficient to establish a nexus between the defendant's actions and the injuries. *See id.*

The Utah Court of Appeals reversed the trial court's order of restitution because the prosecutor had failed to describe a causal nexus between the actions and injuries. *See id.*

¶14. Further, the Court of Appeals found that the defendant was not granted a proper restitution hearing when the hearing did not fully address the issue of causation, and when the victim's "bare bones proffers" failed to flesh out the causal nexus between the criminal conduct and the loss, leaving little basis to determine whether that nexus was not too attenuated. *See id.* ¶¶ 15–16.

Setting aside the fact that Mr. Speed was never afforded a full restitution hearing, the allegations on the record are insufficient to establish and prove that Mr. Speed is responsible for \$126,547, the full amount of losses claimed by ACS. There is no evidence on the record to support that amount as the losses related to Mr. Speed's criminal activities. Indeed, Mr. Speed claimed that some of the phones he sent out were sent to actual customers, and Salt Lake City detectives were able to sift through some evidence to find which phones were illegally sent out. (R38.) Such "bare bones proffers" of the amount lost by ACS are insufficient to establish the causal nexus between Mr. Speed's activities and ACS' alleged loss.

Utah law is clear that the burden is on the State to prove the fact and amount of restitution. *Brown*, 2009 UT App 285, ¶ 10. However, there is no record that the prosecutor ever put on evidence or argued for restitution at sentencing. Instead, the trial court accepted the presentence report prepared and submitted by AP&P, and asked

defense counsel for more information regarding restitution. This Court should find that the trial court impermissibly shifted the burden of proof on restitution to the defense, and the State failed to prove that the full amount of restitution claimed in the presentence report was caused by Mr. Speed's activities. Therefore, the trial court abused its discretion by denying Mr. Speed's Motion for Relief from Judgment and Request for Restitution Hearing.

**II. Appellant's trial counsel rendered ineffective assistance of counsel in violation of Appellant's federal and state constitutional rights when he failed to follow up on Appellant's request for a restitution hearing.**

If the Court of Appeals finds that defendant waived any objection to the restitution amount by failing to file a motion for a restitution hearing, then it should find that Mr. Speed received ineffective assistance of counsel when his trial counsel failed to properly object to the amount of restitution and file a motion as requested by the Court.

**A. Preservation**

Traditionally, a claim of ineffective assistance of counsel is raised in collateral proceedings. *State v. Humphries*, 818 P.2d 1027, 1029 (Utah 1991). However, an ineffectiveness claim may be raised for the first time on direct appeal "if the trial record is adequate to permit decision of the issue and [the] defendant is represented by counsel other than trial counsel." *Id.*; see also *State v. Hopkins*, 1999 UT 98, ¶ 12, 989 P.2d 1065; *State v. Hovater*, 914 P.2d 37, 40 (Utah 1996). In this case, the trial record is adequate to permit the Court of Appeals to decide this issue, and Mr. Speed is represented by conflict counsel.

## **B. Applicable standard**

The Sixth Amendment of the Federal Constitution and article I, section 12 of the Utah Constitution guarantee criminal defendants the right to assistance of counsel. The right to counsel has been construed to be “the right to effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970); accord *State v. McNicol*, 554 P.2d 203, 204 (Utah 1976). The United States Supreme Court set forth the proper test for an ineffective assistance of counsel claim:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland v. Washington*, 466 U.S. 668, 687 (1984). Mr. Speed's trial counsel's performance was deficient as set forth herein. As a result of this deficient performance, Mr. Speed was deprived of his due process in contesting the amount of restitution imposed on him.

## **C. Mr. Speed's trial counsel rendered ineffective assistance of counsel when he failed to move the Court for a restitution hearing when he knew that the amount of restitution was in dispute.**

Should the Court determine that Mr. Speed waived his objections to restitution because his trial counsel failed to file a motion for a restitution hearing, or otherwise clearly object, this Court should find that Mr. Speed's trial counsel rendered ineffective assistance of counsel. An attorney has a duty to represent the interests of a client with

“zeal and loyalty.” *State v. Holland*, 876 P.2d 357, 359 (Utah 1994) (citation omitted).

This duty is “so essential to the proper functioning of the judicial system that its faithful discharge is mandated not only by the Rules of Professional Conduct, but also, in criminal cases, by the Sixth Amendment right of a criminal defendant to the effective assistance of counsel.” *Id.*

It is clear from the record that Mr. Speed’s trial counsel, Brock Van de Kamp, knew that Mr. Speed disputed the full amount of restitution and wanted a hearing. (R122 at 10:10-11:10.) Judge Atherton directed him to file a motion for restitution with the court. (*Id.*) This Court should find that trial counsel’s failure to file the requested motion for restitution was deficient, and his error of failing to object to the amount of restitution was so serious as to deprive Mr. Speed of his statutory right to a full and complete restitution hearing.

Trial counsel’s deficient performance prejudiced Mr. Speed because it allowed him to have an incredibly large amount of restitution imposed against him. Mr. Speed told the trial court that he was eighteen months into his probation before he received any notice of the restitution amount that he would be paying, and by then there was already \$7,000 in accumulated interest. (R60.) Mr. Speed is a young man and recently married, and works for about minimum wage. (R35-42.) He has been extremely prejudiced by failing to receive his statutory right to a full and complete restitution hearing, and from being burdened with a debt of restitution that will be close to impossible for him to pay off given his circumstances. Therefore, this Court should find that Mr. Speed’s trial

counsel rendered ineffective assistance of counsel.

**CONCLUSION**

For the reasons stated above, Mr. Speed requests that the restitution order be vacated. In the alternative, Mr. Speed requests that this Court remand the case to the trial court for a full restitution hearing.

DATED this 30<sup>th</sup> day of October, 2015.

RICHARDS BRANDT MILLER NELSON



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JOEL J. KITTRELL

KRISTINA H. RUEDAS

*Attorneys for Defendant/Appellant*

**CERTIFICATE OF DELIVERY**

I, KRISTINA H. RUEDAS, hereby certify that I have caused to be delivered a copy of the foregoing BRIEF OF APPELLANT by way of hand-delivery, to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 30<sup>th</sup> day of October, 2015.

  
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## CERTIFICATE OF COMPLIANCE

Appellant, by and through counsel of record, Kristina H. Ruedas of and for the law firm RICHARDS BRANDT MILLER NELSON, hereby certifies that Brief of Appellant complies with the type-volume limitation of Rule 24(f)(1) of the Utah Rules of Appellate Procedure. Specifically, Brief of Appellant contains 6,658 words (according to the word count feature in Microsoft Word), exclusive of the cover page, table of contents, table of authorities, certificate of service, and the addenda.

DATED this 30<sup>th</sup> day of October, 2015.

RICHARDS BRANDT MILLER NELSON

  
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JOEL K. KITTRELL  
KRISTINA H. RUEDAS  
*Attorneys for Defendant/Appellant*

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## ADDENDA

# ADDENDUM A

U.S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## ADDENDUM B

UTAH CONST. art. I, § 12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

## ADDENDUM C

Utah Code Ann. § 77-38a-302. Restitution criteria.

(1) When a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this chapter, or for conduct for which the defendant has agreed to make restitution as part of a plea disposition. For purposes of restitution, a victim has the meaning as defined in Subsection 77-38a-102(14) and in determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Subsections (2) through (5).

(2) In determining restitution, the court shall determine complete restitution and court-ordered restitution.

(a) "Complete restitution" means restitution necessary to compensate a victim for all losses caused by the defendant.

(b) "Court-ordered restitution" means the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence at the time of sentencing or within one year after sentencing.

(c) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (5).

(3) If the court determines that restitution is appropriate or inappropriate under this part, the court shall make the reasons for the decision part of the court record.

(4) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall allow the defendant a full hearing on the issue.

(5)

(a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court or to which the defendant agrees to pay restitution. A victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

(i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;

(ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(iii) the cost of necessary physical and occupational therapy and rehabilitation;

(iv) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim;

(v) up to five days of the individual victim's determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the victim and were essential to the victim's current employment at the time of the offense; and

- (vi) the cost of necessary funeral and related services if the offense resulted in the death of a victim.
- (c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider:
  - (i) the factors listed in Subsections (5)(a) and (b);
  - (ii) the financial resources of the defendant, as disclosed in the financial declaration described in Section 77-38a-204;
  - (iii) the burden that payment of restitution will impose, with regard to the other obligations of the defendant;
  - (iv) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;
  - (v) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and
  - (vi) other circumstances that the court determines may make restitution inappropriate.
- (d)
  - (i) Except as provided in Subsection (5)(d)(ii), the court shall determine complete restitution and court-ordered restitution, and shall make all restitution orders at the time of sentencing if feasible, otherwise within one year after sentencing.
  - (ii) Any pecuniary damages that have not been determined by the court within one year after sentencing may be determined by the Board of Pardons and Parole.
- (e) The Board of Pardons and Parole may, within one year after sentencing, refer an order of judgment and commitment back to the court for determination of restitution.